Kelly Brothers Sheet Metal, Inc. *and* George E. Twiss *and* Sheet Metal Workers' International Association Local Union No. 435, AFL–CIO. Cases 12–CA–22495, 12–CA–22544, and 12–CA–22843

June 21, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On September 3, 2003, Administrative Law Judge Pargen Robertson issued the attached decision. The Respondent filed exceptions[1] and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

The administrative law judge found that Kelly Brothers Sheet Metal, Inc. (the Respondent) violated Section 8(a)(1) of the Act when its Project Manager Bobby Kelly threatened employees with the loss of job opportunities if they selected the Union as their bargaining representative. For the reasons set forth below, we agree with this finding.[4]

The Respondent installs HVAC systems in new and renovated buildings. In March 2002,[5] it started work on a hospital construction project. In late November or early December, employees were told to leave the hospital and go back to the shop and clock out. Kelly told employees that they were going to have a meeting about the Union, but that they should go across the street to the graveyard since he would have to give the Union equal time if he spoke to them on company property. According to the credited testimony of employee Laymon Miller, Kelly then told the group of 50 to 60 employees that "he could afford to keep us working year-round right now but if we went union, he couldn't keep us working because there wasn't [sic] that many union jobs around. There weren't any union contractors around." As stated above, we agree with the judge that this statement by Kelly was a threat of loss of job opportunities and was a violation of Section 8(a)(1).[6]

It is well established that an employer may "make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control . . . ." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). Accordingly, the Board consistently has held

[1] No exceptions were filed to the judge's findings that Charles Gray, Curtis Higbee, and Gwynn (Tad) Lee were statutory supervisors and that the Respondent violated Sec. 8(a)(1) of the National Labor Relations Act (the Act) by interrogating employees about their union activities, creating the impression that it was engaged in surveillance of employees' union activities, threatening employees with discharge because of their union activities, discriminatorily prohibiting employees from discussing the Union while on the job, and soliciting employees to revoke their union authorization cards.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge found that the Respondent violated Sec. 8(a)(3) and (1) of the Act by discharging employee George Twiss because of his union activities. The judge found that the credited evidence failed to show that Twiss would have been discharged in the absence of his union activities, rejecting the Respondent's contention that Twiss was discharged for being out of his workplace and interfering with other employees' work. The Respondent contends that the judge ignored testimony by Supervisor Franklin Smith that he had discharged employees Harry Lively and David McDonald, without prior warning or discipline, because they were not staying in their workplace. Although the judge did not explicitly discredit this specific testimony by Smith, it is clear that the judge implicitly discredited it. See *Electri-Flex Co. v. NLRB*, 570 F.2d 1327, 1331 (7th Cir. 1978) (explicit credibility findings are unnecessary when a judge has "implicitly resolved conflicts in the testimony by accepting and relying on the testimony of [one party's] witnesses"), cert. denied 439 U.S. 911 (1978). The judge stated that he was not impressed with Smith's demeanor, that his testimony "did not square with the credited record" and "was inconsistent." The judge also consistently credited other witnesses, e.g., Twiss and Brian Harris, over Smith. Furthermore, the judge's statement that there was no showing that the Respondent discharged any of the "many individuals" who were out of their work area, other than Twiss, clearly indicates that the judge discredited Smith's attempt to show that Twiss was treated similarly to Lively and McDonald. In these circumstances, we find no reason to disturb the judge's credibility determinations and agree with the judge that the Respondent failed to show that it would have discharged Twiss in the absence of his union activities.

[3] We shall modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996); *Excel Container, Inc.*, 325 NLRB 17 (1997); and *Ferguson Electric Co.*, 335 NLRB 142 (2001); and to conform to the violations found.

[4] We also agree with the judge, for the reasons set out in his opinion, that the Respondent violated Sec. 8(a)(3) and (1) of the Act when it discharged Robert Fernandez.

[5] All dates are 2002, unless otherwise indicated.

[6] The judge found that Kelly also told employees that he had worked for a union before and that the Respondent wasn't for the union. However, the record shows that this statement was made by Higbee, another of the Respondent's supervisors. This inadvertent factual error does not affect our decision.

that predictions of adverse consequences of unionization arising from sources outside the employer's control violate Section 8(a)(1) if they lack an objective factual basis. Accord, *NLRB v. C.J. Pearson Co*., 420 F.2d 695 (1st Cir. 1969) (under *Gissel Packing*, "consequences not within the control of the employer [may not] be described as probable or likely, [if] in fact there was no objective evidence of any such likelihood").

For example, in *TVA Terminals, Inc.*, 270 NLRB 284 (1984), an employer that stored and shipped baled cotton told employees that if they "went union," a majority of the cotton stored with the employer would not be there, the work would slow down, and the employer would lose its competitive advantage because its rates would be too high. The employer added that if the employees voted against the union they could expect to receive enough cotton to keep them busy during the off season. Id. at 286–287. The Board found that the employer's claim that the cotton would not be there if the employees went union was not grounded on any "objective appraisal" made known to employees. Rather, the employer was speculating about how customers would react to storing cotton in a unionized warehouse on the basis of nothing more than their long acquaintanceship and conjecture about the employer's own rate structure in the event of unionization. Id. at 288. See also *Debber Electric*, 313 NLRB 1094, 1097 (1994) (employer's general defense to its statements about closing the business and its inability to get work in the event of unionization—that it did not have a formula to be able to get work that was consistent with the union's area contract—does not constitute a proper showing of rationale required by *Gissel Packing*).

Here, as in *TVA Terminals* and *Debber Electric*, the Respondent furnished no objective basis for claiming that unionization would adversely affect its operations. Under the Supreme Court's decision in *Gissel Packing*, the "burden has been placed upon the employer to justify such statements by objective evidence. [Citations omitted.] Since [the Respondent] made no attempt to meet this burden before the Board," a finding of a Section 8(a)(1) violation is warranted. *Zim's IGA Foodliner, Inc. v. NLRB*, 495 F.2d 1131, 1137 (7th Cir. 1974), cert. denied 419 U.S. 838 (1974). In this regard, the instant case is distinguishable from *NLRB v. Village IX, Inc*., 723 F.2d 1360, 1367–1368 (7th Cir. 1983), in which a restaurant operator was found to have had objective support for predicting the adverse consequences of unionizing by pointing to the competitive nature of the restaurant business and to the fact that only one restaurant in the area was unionized, and it was doing badly. Here, the Respondent produced no evidence whatsoever as to the number of nonunion or unionized contractors in the area or that it would be unable to operate as an organized company.

The instant case is also distinguishable from *Enjo Architectural Millwork*, 340 NLRB No. 162 (2003), a case relied on by the dissent. The employer in that case told employees that they "should think twice about joining the Union" because the "company isn't competitive" and that "if the union get[s] in and start[s] to make demands, we wouldn't be able to compete with our competitors." Id., slip op. at 1. The Board found that these statements were neither threats of reprisals nor of layoffs. The Board noted that an employer has the right "to convey to employees a view of its present economic situation and to ask them to consider whether union representation would improve or worsen the situation. That is exactly what the Respondent did here, without any suggestion that it would retaliate against employees if they chose union representation . . . ." Id., slip op. at 2. Here, however, Kelly said that he could not keep the employees working if they went union. Unlike the employer in *Enjo*, Kelly linked job loss to employees' choosing union representation, effectively threatening them with adverse consequences for selecting the union.[7]

The dissent speculates that the Union would be successful in obtaining a union signatory subcontracting clause and that Kelly was reasonably predicting that, under such a clause, "work would dry up because there were not many union jobs available." This speculation, which is purely the creation of our dissenting colleague, does not render Kelly's statement lawful. There was no indication in the record that the Union would demand such a clause and no reference to a master collective-bargaining contract containing such a clause. Further, the Respondent never cited the possibility of operating under a union signatory subcontracting clause as the objective basis for its statement—either when Kelly made the statement or at the unfair labor practice hearing. To the contrary, the Respondent denied that Kelly ever made the statement at issue.[8] Even assuming that the dissent's supposition was in the Respondent's mind, and again,

[7] The dissent acknowledges that here there was a prediction of adverse consequences and that in *Enjo* there was not, but the dissent discounts the difference. But the difference is critical, and *Enjo* itself indicates this. (In dismissing, the Board in *Enjo* found that "the Respondent acknowledged that it was presently noncompetitive and, *without expressly or implicitly predicting any adverse consequences*, asked employees to take that factor into account in deciding whether they want a union to represent them . . . ." 340 NLRB No. 162, slip op. at 3 (emphasis added)).

[8] Indeed, the Respondent does not argue, as our dissenting colleague does, that were the employees' testimony credited, Kelly's statements nonetheless did not violate the Act. Rather, it only argues that the employees' testimony should not be credited and that Kelly did not make the statements the judge found that he made.

there is no evidence that it was, it was never made known to the employees. They were told that the Respondent could not keep them working if they went union. Kelly's statement would reasonably be interpreted by the employees as an unlawful threat of job loss because the Respondent did not, as *Gissel Packing* requires, phrase its prediction on the basis of objective facts to convey its belief as to "demonstrably probable consequences beyond his control." Finally, the reasonableness of the prediction is irrelevant. Under *Gissel Packing*, an employer must phrase its predictions "on the basis of objective fact," and as noted above, the Respondent did not do so.[9]

Accordingly, we agree with the judge that the Respondent violated Section 8(a)(1) of the Act by threatening employees with the loss of job opportunities if they selected the Union.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Kelly Brothers Sheet Metal, Inc., Tallahassee, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees about their activities on behalf of the Sheet Metal Workers' International Association Local Union No. 435, AFL–CIO, or any other labor organization.

(b) Creating the impression that it is engaged in surveillance of its employees' union activities.

(c) Threatening its employees with discharge because of their union activities.

(d) Discriminatorily prohibiting its employees from discussing the union while on the job.

(e) Soliciting its employees to revoke their union authorization cards.

(f) Threatening its employees with loss of job opportunities because of their union activities.

(g) Discharging its employees because of their union activities.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer George Twiss and Robert Fernandez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make George Twiss and Robert Fernandez whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of George Twiss and Robert Fernandez, and within 3 days thereafter notify them in writing that this has been done and that the unlawful discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Tallahassee, Florida, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 13, 2002.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region at-

[9] The dissent also claims that we have stated that the Respondent asserted that it would be unable to operate as a unionized company. The dissent has misconstrued our position. In pointing out that the Respondent failed to furnish an objective basis for claiming that unionization would adversely affect its operations, we noted only that the Respondent produced no evidence that it would be unable to operate as an organized company.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

testing to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 21, 2004

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, dissenting in part.

I agree with my colleagues and the judge that the Respondent violated Section 8(a)(3) of the Act by discharging employees Robert Fernandez and George Twiss. Contrary to the judge and my colleagues, however, I do not find that the Respondent violated Section 8(a)(1) by allegedly threatening employees with the loss of job opportunities if they voted for the Union.

In either November or December 2002, the Respondent's project manager, Bobby Kelly, held a meeting in which he addressed the subject of the union campaign. According to the credited testimony of employee Laymon Miller, Kelly told the employees that "he could afford to keep us working year-round right now but if we went union, he couldn't keep us working because there wasn't [sic] that many union jobs around. There weren't any union contractors around." I find this statement to be a lawful expression of the Respondent's opinion concerning the possible effect unionization could have on its ability to operate in the marketplace.

As the majority states, an employer may convey its "belief as to demonstrably probable consequences beyond his control" resulting from unionization, as long as this belief is based on "objective fact." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). In dismissing an allegation similar to the one at issue here, the Board stated recently:

> There is nothing inherently unlawful about an employer asking employees to consider the impact of unionization on the Company's poor competitive position. On the contrary, during a union organizational campaign, an employer has the right under Section 8(c) to convey to employees a view of its present economic situation and to ask them to consider whether union representation would improve or worsen that situation.

Enjo Architectural Millwork, 340 NLRB No. 162, slip op. at 2 (2003).

I find that Kelly's stated doubt about the continuing viability of the company "because there [weren't] that many union jobs around" to be a lawful expression of his opinion about the possible effect of unionization. In the construction industry, it is not unusual for unions to insist upon, and obtain, clauses that require the signatory to work only on union jobs.[1] The employer here was simply making the prediction that, under such a clause, work would dry up because there were not that many union jobs available. To be sure, the Respondent did not know for a certainty that the Union would be able to get such a clause. However, given the history of such clauses (see fn. 1, supra), the Respondent's prediction was a reasonable one. Thus, the Respondent was making an economic prediction, not an unlawful threat to retaliate. It strains credulity to believe that the Respondent would not *want* all the jobs it could get. The Respondent was simply making the rueful prediction that, under a Union contract, it would be shut out of some markets.

The majority asserts that employees "were told [by Kelly] that the Respondent could not keep them working if they went union." However, Kelly also said there "weren't any union contractors around." Thus, contrary to the majority, it is not "speculation" to say that Kelly was discussing the difficulties of operating as a union contractor.

Just as in *Enjo*, Kelly made the statement "without any suggestion that [the Respondent] would retaliate . . . or that it would have to lay them off if the Union made demands." *Enjo*, slip op. above at 2 (finding lawful statement that employees should "think twice" about the union because "the company isn't competitive" and the union would not be "beneficial to the company").

My colleagues seek to distinguish *Enjo* on the basis that the Respondent here said that he could not keep employees working year-round if they chose union representation. In my view, this is a distinction without a real difference. In *Enjo*, the Board found that there was no prediction of adverse consequences. In the instant case, there was such a prediction. A prediction is lawful, so long as it is a prediction of economic consequences, rather than a threat of reprisal. As *Enjo* makes plain, the issue in these cases is whether there was a threat of reprisal for engaging in protected activity. As set forth above, I believe that there was no such threat.

My colleagues also incorrectly state that the Respondent asserted that it would be unable to operate as an organized company. Kelly made no such assertion; he simply stated that he thought there was enough work until the end of the year, after which point he could not be confident, due to the changed circumstances under

[1] *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 657–658 (1982).

which the Respondent would be operating. As such, he made a prediction. He may have been incorrect, but he did not violate the Act.

Dated, Washington, D.C. June 21, 2004

Robert J. Battista, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate our employees about their activity on behalf of the Sheet Metal Workers' International Association Local Union No. 435, AFL–CIO, or any other labor organization.

WE WILL NOT create the impression that we are engaged in surveillance of our employees' union activities.

WE WILL NOT threaten our employees with discharge because of their union activities.

WE WILL NOT discriminatorily prohibit our employees from discussing the union while on the job.

WE WILL NOT solicit our employees to revoke their union authorization cards.

WE WILL NOT threaten our employees with loss of job opportunities because of their union activities.

WE WILL NOT discharge our employees because of their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, within 14 days from the date of the Board's Order, offer George Twiss and Robert Fernandez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make George Twiss and Robert Fernandez whole for any loss of earnings and other benefits resulting from our discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of George Twiss and Robert Fernandez, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the unlawful discharges will not be used against them in any way.

KELLY BROTHERS SHEET METAL, INC.

Rafael Aybar, Esq. and *Jermaine Walker, Esq.*, for the General Counsel.
Paul R. Beshears, Esq., for the Respondent.

DECISION

STATEMENT OF CASES

PARGEN ROBERTSON, Administrative Law Judge. A hearing was held in Tallahassee, Florida, on June 11 and 12, 2003. I have considered the entire record and briefs filed by Respondent and the General Counsel in reaching this decision.

Jurisdiction

At material times Respondent has been a Florida corporation with an office and principal place of business in Tallahassee, where it has been engaged in the nonretail business of furnishing HVAC systems in new and renovated buildings. Annually, in conducting its business operations, Respondent purchases and receives goods valued in excess of $50,000 at its Tallahassee facility directly from points outside Florida. Respondent has been an employer engaged in commerce within the meaning of the National Labor Relations Act (Act), at all material times.

Labor Organization

At material times the Charging Party (Union) has been a labor organization within the meaning of the Act.

Supervisory Issue

Respondent admitted that Ronald (Bobby) Kelly Jr., Rischar, and Smith were supervisors and agents at material times. It denied that Gray, Curtis Higbee, and Gwynn (Tad) Lee were supervisors or agents.

Respondent worked on the Tallahassee Community Hospital (TCH) project. That work was on a six-story building. Respondent installed ductwork for the air conditioning system and their work started on March 4, 2002.

Smith testified that he has worked for Respondent for 12 years and is Respondent's superintendent. Bob Kelly is Respondent's president. Bobby Kelly is its project manager. Rischar is the job superintendent. Mark Miller is a supervisor. In July 2002, the Company employed about 100 employees.

Employees included sheet metal mechanics and helpers and employees in the welding and service departments.

Smith gave orders to Rischar who, in turn, gave orders to Gray, Higbee, and Lee. According to Smith, Gray, Higbee, and Lee were responsible for assigning work to employees only under the directions of Rischar. Gray, Lee, and Higbee were responsible for reporting to superiors the unsatisfactory work performance of employees. Those reports did not include recommendations of disciplinary action. Gray, Higbee, and Lee did not have authority to fire or suspend employees. Nor did Gray, Lee, and Higbee have authority to effectively recommend that an employee be fired or suspended. On the average Gray, Lee, and Higbee were each responsible for seven or eight employees. Smith and Bobby Kelly were responsible for hiring employees.

Smith testified that Lee was a floor foreman. Gray, Higbee, and Miller[1] were also floor foremen and Gray, Lee, and Higbee had similar job duties on the TCH project. Their jobs involved keeping the ductwork laid out ahead of the mechanics. Smith assigned Gray, Lee, and Higbee their particular floor foreman jobs on TCH. Gray was assigned to the third floor on the TCH project. Lee was assigned to the second floor. Higbee was responsible for running the exhaust duct from the first floor up through the sixth floor.

Smith testified that he or Rischar inspected the work of each crew. Gray, Lee, and Higbee did not inspect employees' work. They did not evaluate employees' work. They did not have authority to direct employees to correct work. They did not transfer employees to other jobs unless directed to do so by Rischar. Gray, Lee, and Higbee did not train employees on how to perform jobs safely. Nor did they review work for safety violations. Gray, Lee, and Higbee also worked as mechanics. Each of them was paid on an hourly basis. Each made $18 an hour, as did other mechanics.

Gray, Lee, and Higbee may have tried to smooth out arguments between employees. None of the three could allow an employee to leave early nor could Gray, Lee, or Higbee assign overtime. Gray, Lee, and Higbee did not maintain employees' time or overtime. With the exception of Smith, all the others including Rischar punched the timeclock.

When recalled during Respondent's case, Smith testified that when he assigned work for Sunday, he told Higbee that if he needed any extra help to get Miller and anybody else that he needed to help him. He then told Miller that they would probably need to work Sunday if Higbee needed them.

Smith, Bobby Kelly, and Bob Kelly attended supervisory meetings. No one else attended those meetings.

Twiss testified that while he was employed he worked with Foreman Gray. Gray told Twiss what work he was to perform. Gray checked every project Twiss worked on. He told Twiss that he was happy with his work performance. Gray did not work alongside the employees. Twiss testified that the only physical work he saw Gray perform was drawing up fittings and taking measurements. Twiss estimated that drawing up fittings and taking measurements appeared to him to involve 8 to 10 percent of Gray's worktime. During the remainder of his time Gray was away from the job or was involved in checking to make sure that projects in the different areas were getting done.

Gray monitored Twiss's work. Gray did not talk to Twiss about safety matters and he did not assign overtime. Instead overtime was scheduled at the time Twiss started his job with Respondent.

Higbee testified that he has worked for Respondent for over 9 years. Higbee denied that he worked as a foreman on the TCH project. He did work on that project from mid-April 2002. He did have three helpers on the TCH project and he admitted that he sometimes spoke to employees about something they should not have been doing. He oversaw everything that went on in the mechanical rooms. He testified that even though Twiss was not on his crew, he spoke to Twiss on a number of occasions. Higbee testified that on one occasion he told Twiss that "to get off his ass and get to working." Higbee testified that he also saw other employees out of their work areas. According to Higbee, he reported incidents to Rischar whenever he noticed employees sitting on their butts during working hours.

Higbee directed work of his helpers. He told the two less experienced helpers how to glue, where to glue, when to glue ductwork and which sealant was for airtight seals. The third helper helped Higbee lay out and install hangers.

Miller recalled that during the time he worked for Respondent he worked under Foreman Higbee only a couple of times when Higbee asked him to come in and work overtime on a Sunday. He never saw Higbee discipline anyone but Higbee told Miller that he had fired an employee from Tennessee and that he had had Stokes' pay reduced. Higbee drove a company pickup truck.

During his first 2 or 3 weeks with Respondent, Laymon Miller worked with Foreman Lee. Lee would give all the employees their work assignments at the start of each shift. Lee would look at the work and say it was all right or that something was wrong. Lee would sometimes work along with the other employees if someone was in a bind. Miller estimated that Lee worked with his tools about 20 percent of his time.

Lee testified that he is currently a project superintendent for Respondent. In July 2002, he was a foreman on one end of the 2nd floor of the TCH project. In his job as foreman he was assigned to a particular area and told of his job by Smith or Rischar. Lee was responsible for insuring that all materials were available as needed on his job and that all the employees were performing their assigned duties. He oversaw the work of from 6 to 10 mechanics and helpers. Lee did not issue written disciplinary action.[2] He did verbally warn employees about their actions on the TCH project. Lee recalled that he issued those warnings each day.

Lee testified that Smith and Rischar would ask him about how particular employees were performing. He would advise Smith and Rischar whether he felt an employee was performing good work and that was part of his job. However, Smith and

[1] As shown in the record Laymon Miller was a sheet metal mechanic and not a foreman at some times material herein.

[2] As shown herein Respondent did not issue written warnings during material times.

Rischar did not accept Lee's comments without making their own evaluations.

Lee was responsible for assigning work to employees on a limited basis. He would lay out work ahead of the employees in order to accomplish the assignments given to him by Smith and Rischar. He would sometimes use his knowledge of an employee's experience in making specific assignments. He was responsible for inspecting the quality of each of his employees' work. When Lee felt work would not pass inspection by his superiors, he would direct the employee to correct problems. He would also watch for safety infractions and tell employees when they violated safety standards. He would sometimes reassign employees to work with others when an employee complained that he was working with someone that was too slow.

Lee estimated that he spent 60 percent of his time overseeing and directing the work of other employees.

Job Superintendent Rischar worked for Respondent on the TCH project from February until he had surgery on November 15, 2002. He testified that work assignments on the TCH project were made after the general contractor and Rock City Mechanical would tell Respondent each day what work was needed. Those two contractors would tell Respondent about the pressure points and Rischar would radio his floor foremen regarding the necessary work assignments for that day. Frequently the general or mechanical contractor would radio Rischar regarding an immediate problem that required a work assignment. Rischar would then tell one of Respondent's floor foremen to get people over to handle that immediate problem.

Conclusions

Credibility

I have considered the demeanor of each witness and the full record. As shown above there were substantial conflicts in testimony regarding the duties of the foremen. It is interesting to note that two witnesses, Superintendent Smith and Higbee, testified along the lines that the foremen had no supervisory duties. Others including Foreman Lee and Job Superintendent Rischar as well as mechanics Miller and Twiss testified to the effect that the foremen directed the work of employees on their respective crews.

According to Smith, the foremen, especially Gray, Lee, and Higbee, did not engage in any supervisory activity. Those three, according to Smith, did not direct other employees' work, they did not independently assign work to the employees, they did not evaluate other employees' work, they did not effectively recommend disciplinary action, nor did the three effectively recommend discharge. Instead, either Smith or Rischar preformed all those supervisory functions.

Smith did admit that Gray, Lee, and Higbee were responsible to report unsatisfactory work of employees. Moreover, when recalled to testify by Respondent, Smith testified that he did tell Higbee to select a crew including Miller, to work on a Sunday.

It was undisputed that Respondent's TCH project was a large job involving 6 floors in a hospital building as well as ductwork connecting the 6 floors. Nevertheless, according to Smith, he and Rischar handled all the supervisory responsibilities.

It is undisputed that the general contractors expressed unhappiness with the Respondent's production on the TCH job. Despite that expression and Respondent's admitted hiring of additional employees, it appears from Smith's testimony that two people, Smith and Rischar, handled direct supervision on all six floors of the TCH project.

Higbee's testimony included a denial that he worked as foreman. That conflicted with testimony Higbee gave in an affidavit to the NLRB (GC Exh. 3). In the affidavit Higbee identified his job on the TCH project as foreman and testified that as foreman he was responsible for the mechanical room. Higbee admitted that he directed work of his helpers. Moreover, Higbee admittedly issued verbal warnings and he told Twiss and other employees to get to work even though he was not their foreman.

Foreman Lee, on the other hand, admitted among other things that he oversaw the work of from 6 to 10 employees, that he verbally warned employees each day, he evaluated employees and reported those evaluations to Rischar and Smith and he assigned work. That testimony as well as other testimony including that of Twiss and Miller showed that the foremen assigned work, monitored work, and instructed employees during their work.

In view of demeanor and the full record, I do not credit the testimony of Smith or Higbee unless the specific testimony did not conflict with credited evidence. I credit Miller and Twiss. I was generally impressed with the demeanor and testimony of Lee and I credit his testimony to the extent that it did not conflict with the testimony of Miller and Twiss. I credit the testimony of Rischar to the extent it did not conflict with credited evidence.

Findings

The testimony of Lee showed that foremen were responsible for having all materials on the job as needed; foremen oversaw that all the employees were performing their assigned duties; foremen oversaw the work of employees; foremen issued warnings to employees on a regular basis;[3] foremen informed their supervisors how specific employees were performing; foremen assigned work to employees on a limited basis; foremen would lay out work ahead of employees; foremen sometimes made specific job assignments to employees based on the foreman's knowledge of that employee's skills; foremen told employees to correct problems if the work did not pass the foreman's inspection; foremen watched for safety infractions told employees when they were in violation; and foremen reassigned employees when an employee complained that his coworker was too slow.

Credited testimony including that of Twiss and Laymon Miller, showed that the foremen initially assigned each employee work at the beginning of each shift; the foremen were the ones that instructed the employees which work to perform; the foremen monitored and checked all the employees' work

[3] Respondent project manager, Ronald Kelly Jr. and Superintendent Smith testified that Respondent did not have a formalized discipline policy of issuing written warnings during the summer and fall of 2002. However, as shown herein, verbal warnings were issued by foremen including specifically Lee and Higbee.

and oftentimes told the employees whether their work was good or otherwise; and foremen Gray and Lee spent about 10 percent to 20 percent[4] of their total worktime drawing up fittings and taking measurements or working with others when they got behind.

Legal Conclusions

The National Labor Relations Act defines "supervisor" as any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or responsibly direct them, or to adjust their grievances, or effectively to recommend such action. As noted above, the credited records shows that foremen on the TCH project including Gray, Lee, and Higbee, had authority to assign and discipline employees and the foremen responsibility directed the work of others and adjusted their grievances. *NLRB v. Kentucky River Community Care, Inc*., 532 U.S. 706, 713 (2001); *Beverly Enterprises*, 313 NLRB 491 (1993).

The credited evidence proved that TCH foremen exercised independent judgment in issuing the only disciplinary action exercised by Respondent short of suspension or discharge.[5] *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000). Lee and Higbee admittedly issued verbal warnings to employees both inside and outside of in their respective crews. The testimony of Higbee showed that those warnings were issued without consulting higher-level supervisors. Therefore, the foremen issued warnings through use of independent judgment. Moreover, the credited evidence showed that foremen exercised independent judgment in evaluating the work of crewmembers; assigning work with a mind toward the skills of the individual employee; directing employees to correct defective work; and in monitoring and overseeing the work of their crewmembers. Therefore, I find that Higbee, Lee, and Gray were supervisors and agents of Respondent at material times.

Unfair Labor Practice Allegations

Section 8(a)(1)

By Charles Gray:
Interrogation:
Threat of Discharge:
Impression of Surveillance:

When Twiss started working for Respondent on August 24, 2002, his foreman, Gray, asked him, "Are you from the Union?" Twiss did not answer that question. Instead he replied, "Man, I'm from the west side."[6] Gray then said that he had been a member of the Union Local 85 in Georgia.[7]

Twiss asked Gray to sign a union card on September 13, 2002. Gray replied "*Hell, no*," and walked away. Then Gray came back and said to Twiss, "*Let me give you a hint. Max and Franklin know the names of everyone that was at that union meeting the other night. If we hear any talk going on about a union you will be fired and your check will be here in 10 minutes. We'll have your check here in ten minutes*."[8] Twiss then heard Gray say into his cell phone, "*Max, we have to talk immediately*."

Harris was also present during that conversation. Harris testified that Gray told Twiss that Rischar and Smith said that they knew about a union meeting and that somebody was there and took names. Gray said that if there "was any more talk about union on the job, that Franklin [Smith] would have their check in ten minutes and run their butts off."

Twiss had a second conversation with Gray regarding the Union on September 13. Gray asked Twiss why he would want anybody to join a union since the union didn't have any work in Tallahassee.

Conclusions

Credibility

Gray did not testify.[9] In consideration of their demeanor and the entire record I credit the testimony of Twiss and Harris.

Findings

The credited testimony shows that Gray questioned Twiss about whether he was from the Union and why he would want anybody to join a union. That testimony also showed that Gray threatened Twiss that Respondent's supervision knew which employees had attended a union meeting and that Twiss would be fired if they heard any talk going on about a union.

By Franklin Smith:
Prohibited employees from discussing the Union:
Threat of Discharge:
Interrogation:

Counsel for the General Counsel pointed to the incident of Twiss's discharge to support its allegation that Smith made comments in violation of Section 8(a)(1). On September 14 shortly before he checked in on the TCH job, Twiss was with Harris and a few other employees. Smith said, "*Everett, you're fired. I'm not going to have you come on my job trying to recruit my men for the union on my time*." Twiss replied, "*Franklin, I haven't been doing it on your time*." Smith repeated, "*Well, you're fired*." Then Smith told Harris to come over. Twiss stated that Harris did not belong to his union. Smith asked, "*Brian, do you belong to the union?*" Harris replied that he did not.

Harris testified that as he and Twiss were going to their workstation, Smith yelled, "George Twiss." Smith then told Twiss that he was fired and said it's "*for promoting the union on my time*."

[4] Lee testified that he spent 60 percent of his work overseeing and directing the work of other employees.

[5] Respondent did not issue written warnings during the summer and fall of 2002.

[6] Twiss was referring to the west side of Jacksonville, Florida.

[7] Harris was present during this conversation between Twiss and Gray.

[8] Max and Franklin are admitted supervisors (Max Rischar and Franklin Smith).

[9] Gray's October 24, 2002 affidavit was received in evidence. His testimony shows that he did have conversations with Twiss about the Union but Gray generally denied that he interrogated employees about their union sympathies, that he threatened any employee that he was being "surveilled" and that he threatened any employee with discharge for union activities.

Smith testified that Gray told him that Twiss was talking about the Union while at work. Smith testified that he told Twiss that Twiss could not talk Union on Company time. Smith testified that he told Twiss that he did not care if Twiss talked to employees about the union before worktime, breaktime, lunch, or afternoon.

Conclusions

Credibility

As shown herein, I was not impressed with the demeanor of Smith. As to the incident involving the discharge of Twiss, I was more impressed with the testimony of Twiss and Harris.

Smith implied that Respondent had a rule against talking about the union on the job. However, the credited record did not show there was a nondiscriminatory rule that would include a prohibition against talking about the union. The full credited record showed there was no rule against talking before the September 14 discharge of Twiss.

I credit the testimony of Twiss and Harris and do not credit the testimony of Smith.

Findings

The credited record showed that Respondent did not have a rule or rules against solicitation, talking, or distribution before September 14. Nevertheless, the undisputed record shows that Smith told Twiss that he was discharged because he was recruiting for the Union.

Smith was in effect telling employees that recruiting for the union while on the job was prohibited. In view of the record showing that Respondent had no rule against talking, solicitation, or distribution before that comment, it is clear that Respondent was discriminatorily prohibiting the employees from discussing the union. Moreover, that evidence shows that Respondent did not differentiate between time involved in work and time on breaks and at meals.

Smith's comments also included a threat that employees that recruited for the union while on the job would be discharged. Additionally, Smith questioned Harris as to whether Harris was in the Union.

By Gwynn (Tad) Lee:
Solicited revocation of Union cards:
Interrogation:
By Curtis Higbee:
Solicited revocation of Union cards:
Interrogation:

Testimony including that of Lee and Higbee showed that Lee and Higbee prepared union free cards[10] and both Lee and Higbee distributed those cards and asked employees to sign and return those cards to them.

Around the end of October 2002, Lee handed Miller a copy of General Counsel's Exhibit 7. Lee said the he and the Kelly Brothers weren't for the Union and didn't want it. Later, about the first of November, Higbee gave Miller a similar paper. Lee gave employee Reed a similar paper as he was clocking in or out, in October or November.

The paper given employees by Lee or Higbee, stated:

THE EMPLOYEES OF KELLY BROTHERS SHEET METAL INC WHO WISH TO REMAIN UNION FREE I THE UNDER SIGNED HEREBY MAKE KNOWN THAT I WISH TO
NEGOTIATE ON MY OWN BEHALF DIRECTLY WITH KELLY BROTHERS SHEET METAL INC.
FURTHERMORE, IF IN HAST I PREVIOUSLY SIGNED A UNION CARD
WITHOUT ALL THE FACTS I NOW DECLARE THAT DECISION NULL AND VOID

NAME_____
TEL NO_____
ADDRESS_____
CITY_____
STATE_____ZIP CODE_____
DATE_____(SIGN)_____

There was no evidence that any employees requested assistance in revoking union authorization cards.

Conclusions

Credibility

There is no dispute regarding this matter. Lee and Miller admitted that the two of them created General Counsel's Exhibit 7 and that the two of them distributed the union free cards to employees.

Findings

Unlike the situation where Respondent restricted and punished employees for engaging in prounion activity on the job, two supervisors distributed union free cards on the worksite especially near the timeclock. Higbee admitted that he passed out approximately 50 cards to employees and that around 42 or 43 employees returned signed union free cards to him.

By Ronald (Bobby) Kelly Jr:[11]
Threatened loss of work and more onerous working conditions.

Miller and Reed testified about a meeting near Respondent's shop around late November or early December. Miller, Reed, and other employees were told to leave the TCH project and go back to the shop and clock out. About 50 to 60 employees returned to the shop. Miller testified that Bobby Kelly spoke to the employees. He told the employees that they were going to have a meeting about the union but since he couldn't speak about the Union on company property, the employees were to go across the street to the graveyard. Bobby Kelly spoke to the employees at the graveyard. He said that right now he could keep them working year around but if they went union he couldn't keep them working because there weren't that many union jobs around. Kelly told the employees that he had worked for a union before and that Kelly Brothers wasn't for the union. He wasn't for the union. Kelly said the only thing the union wanted was for the employees to give it their money.

[10] GC Exh. 7.

[11] Respondent admitted that Kelly was its supervisor and agent.

TCH project manager, Ronald Kelly Jr., admitted that he talked to employees about the union in the graveyard. He denied telling the employees that he could not keep them working year around if they went union. Kelly denied that he opposed the Union.

CONCLUSIONS

Credibility

In consideration of the demeanor of the witnesses and the full record I am convinced that Miller and Reed testified truthfully regarding the graveyard meeting. I credit their testimony in that regard and do not credit the conflicting testimony of Ronald Kelly Jr. The record showed that at the time of the meeting both Respondent in general and Kelly in particular, were opposed to the Union. In fact Kelly stated that he held the meeting off Company property in order to avoid any possibility the Union would be given equal time to speak to employees at the Company. I find Kelly's testimony that he did not oppose the Union was not believable and I do not credit his testimony, which conflicts with credited evidence.

Findings

The credited testimony showed that Bobby Kelly threatened Respondent's employees with loss of job opportunities if they selected the Union.

Section 8(a)(1) Legal Conclusions

Interrogation

As shown above Gray and Smith questioned employees about the employees' support of the Union. Counsel for the General Counsel also argued that Lee and Higbee interrogated employees when the two of them distributed union free cards. I find that the actions of Lee and Higbee in that regard did not constitute unlawful interrogation. There was nothing in the union free cards or in the comments made when those cards were distributed, that constituted illegal interrogation. However, as shown above, there were other instances of supervisors questioning employees about the Union.

As to those instances of questioning of employees, I shall consider whether Respondent's actions were unlawful. The Board recently considered whether interrogation was unlawful in *Westwood Health Care Center*, 330 NLRB 935, 939, 940 (2000):

> We agree with our dissenting colleague that the applicable test for determining whether the questioning of an employee constitutes an unlawful interrogation is the totality-of-the-circumstances test adopted by the Board in *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), and adhered to by the Board for the past 15 years. [Fn. 16] We also agree that in analyzing alleged interrogations under the *Rossmore House* test, it is appropriate to consider what have come to be known as "the Bourne factors," so named because they were first set out in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). Those factors are:
>
> *(1) The background, i.e. is there a history of employer hostility and discrimination?*
>
> *(2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?*
>
> *(3) The identity of the questioner, i.e. how high was he in the company hierarchy?*
>
> *(4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of unnatural formality?*
>
> *(5) Truthfulness of the reply.*
>
> Unlike our colleague, however, we note that these and other relevant factors "are not to be mechanically applied in each case." 269 NLRB at 1178 fn. 20. As the D.C. Circuit Court of Appeals has similarly noted, determining whether employee questioning violates the Act does not require "strict evaluation of each factor; instead, '[t]he flexibility and deliberately broad focus of this test make clear that the Bourne criteria are not prerequisites to a finding of coercive questioning, but rather useful indicia that serve as a starting point for assessing the totality of the circumstances.'" *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998), **940* quoting *Timsco, Inc. v. NLRB*, 819 F.2d 1173, 1178 (D.C. Cir. 1987). In the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act.

As found above, Gray questioned Twiss on the first day Twiss worked, as to whether Twiss was from the Union. Smith interrogated both Twiss and Harris as he discharged Twiss. Smith said Twiss was recruiting for the Union at work and, thereby, questioned whether Twiss was actually recruiting for the Union and when. Smith directly questioned Harris as to whether he was in the Union.

In regard to the Bourne factors, there was evidence that Respondent strongly opposed the Union; that Respondent, especially through its superintendent, Smith, sought information for use in determining whether employees should be terminated; that one of the questioners was the superintendent of the entire TCH job and the other was a foreman directly over the employee questioned; and that both employees Twiss and Harris responded untruthfully when questioned about their union affiliation. Moreover, when considered against the "totality of the circumstances," it is apparent that the interrogations by Smith and Gray were coercisive and constitute violations of Section 8(a)(1) of the Act.

Threat of Discharge

Threat of Loss of Job Opportunities

Foreman Gray threatened employee Twiss that he would be fired and his check would be there in 10 minutes if there were any talk about the Union. Smith discharged Twiss and told Twiss in the presence of Harris, that he was discharged because he was recruiting for the Union on Company time. Smith then asked Harris if he belonged to the Union. I find that Smith

implied that he would discharge Harris if he belonged to the Union. Smith also threatened that he would discharge employees for Union recruiting when he discharged Twiss. Additionally, Ronald Kelly Jr. effectively told employees that he would keep them in work unless they selected the Union in which case he could not keep them working year around.

The Board has consistently found threats of loss of job opportunities or discharge, constitute 8(a)(1) violations. *Donald E. Hernly, Inc*., 240 NLRB 840 (1979); *Sunnyside Home Care Project, Inc*., 308 NLRB 346 fn. 1 (1992); *Wake Electric Membership Corp*., 338 NLRB No. 32, slip op. at 2 (2002). I find that Respondent engaged in unfair labor practices by threatening its employees with discharge and by threatening its employees with loss of job opportunities.

Created the Impression of Surveillance

Foreman Gray told Twiss that Rischar and Smith knew the names of everyone that was at that union meeting.[12] Then Gray went on to say that Twiss would be fired and his check would be delivered in 10 minutes if Respondent heard of any union talk. The test for determining whether Gray's comment constitutes an illegal impression of surveillance is whether the employee would reasonably assume that their union activities were under surveillance. *United States Coachworks, Inc.,* 334 NLRB 118 (2001).

Gray coupled his comments with a threat to discharge anyone talking about the Union. Gray implied that Respondent knew something it had not learned through observation of overt union activities.

The record showed that numerous employees had attended one or more union meetings. Therefore, Gray's comments appeared to be true. In view of that evidence and the full record, I find that Gray's comments did reasonably lead Twiss to believe the employees' union activities were under surveillance and I find that Gray's comment constitutes a violation of Section 8(a)(1).

Prohibited Employees from Discussing the Union

Counsel for the General Counsel pointed to Superintendent Smith's comments when he discharged Twiss, as showing that Respondent unlawfully prohibited employees from discussing the Union. The record showed that despite Smith's comments to Twiss, employees were not otherwise prohibited from talking about nonwork related matters while at work. There was no evidence that Respondent lawfully prohibited solicitation or distribution.

Smith stated in the presence of other employees that Twiss was discharged and that Smith would not allow Twiss to recruit his employees for the Union while Twiss was on Smith's time.

The message was obvious. Smith was discharging Twiss because he felt Twiss had discussed the union with other employees while at work. Its impact on other employees was also obvious. Anyone that discussed the Union while at work ran the risk of being treated like Twiss.

Counsel for the General Counsel pointed out several unlawful aspects of Smith's comments. In the first place, it is usually unlawful to restrict employees from talking about the Union when employees are not working and are otherwise free to discuss nonwork related matters. Smith's comments appeared to encompass all time at work without regard to whether the involved employees were on break or were otherwise engaged in free time activities.[13] *Litton Microwave Cooking Products*, 300 NLRB 324 (1990); *Southeastern Brush Co.*, 306 NLRB 884 (1992).

Also, it is generally an unfair labor practice to prohibit employees from talking about the Union when employees are not prohibited from talking about other nonwork related matters. *Waste Management of Palm Beach*, 329 NLRB 198, 201 (1999).

I find that Respondent engaged in unfair labor practices in violation of Section 8(a)(1) by unlawfully prohibiting its employees from talking about the Union.

Solicited Employees to Revoke Their Union Cards

As shown above Foremen Lee and Higbee prepared and distributed antiunion cards to employees. Those cards contained an indication that the signer was revoking previously signed union cards. In view of the fact that supervisors solicited employees to sign those cards, I find that action constitutes unlawful activity. Supervisors may not lawfully solicit employees to withdraw their union authorization cards. *Mohawk Industries*, 334 NLRB 1170, 1171 (2001).

Here, not only were the antiunion cards prepared and distributed by supervisors, but, as shown herein, the cards were distributed on the TCH job. As shown above, on the other side of the coin, Respondent was holding out to employees advocating the Union that it prohibited their recruiting for the Union while at work.

The employees were told to sign the cards and return it to the foreman. I find those actions by Lee and Higbee constitutes additional violations of Section 8(a)(1).

Section 8(a)(3)

Discharge of George Everett Twiss

Twiss was discharged on September 14, 2002. Superintendent Smith said, "Everett, you're fired. I'm not going to have you come on my job trying to recruit my men for the union on my time." Twiss replied, "Franklin, I haven't been doing it on your time." Smith repeated, "Well, you're fired." Smith asked Harris, "Brian, do you belong to the union?" Harris replied that he did not. Harris testified in corroboration of Twiss's testimony.

Twiss had worked for Respondent as a sheet metal mechanic on the TCH project since August 24, 2002. His foreman was Gray. There were anywhere from 9 to 13 employees on the third floor including the foreman, while Twiss worked there. Twiss testified that on his first day on that job Gray asked him where he was from. When Twiss replied he was from Jacksonville, Gray asked if he was from the union. Twiss replied that he was from the west side of Jacksonville. During that conver-

[12] The record evidence showed that employees had attended a Union meeting before Gray made those comments.

[13] I do not credit Smith's testimony including his testimony that he restricted his prohibition to time other than breaktime and before and after work.

sation Gray told Twiss that he had been a member of Local 85 in Georgia.

Occasionally Twiss's work required him to go to other floors to get materials, supplies, or to seek information from a supervisor. His coworker, sheet metal mechanic Harris, also went to other floors to pick up materials, supplies, or information. Occasionally Twiss and Harris ran those errands together but most of the time they made separate errand runs. On errands Twiss frequently talked with other employees regarding both work related and nonwork related matters.

Twiss has been a member of Local 435 since 1972. On three occasions while he was at work, Twiss solicited employees to sign union authorization cards. Twiss attended a Union meeting in Tallahassee around September 5, 2002.

On the day before his discharge, Twiss asked foreman Gray to sign a union card. Gray replied "*Hell, no*," and walked away. Then Gray came back and said to Twiss, "*Let me give you a hint. Max and Franklin know the names of everyone that was at that union meeting the other night. If we hear any talk going on about a union you will be fired and your check will be here in 10 minutes. We'll have your check here in ten minutes*." Twiss then heard Gray say into his cell phone, "*Max, we have to talk immediately*."

Twiss had a second conversation with Foreman Gray on the day before he was discharged. Gray asked Twiss why he would want anybody to join a union since the union didn't have any work in Tallahassee. Twiss replied that the Union had people that became members over there and they might have some work.

Sheet metal mechanic Harris testified that he worked with Twiss while employed by Respondent on the TCH project. He testified that Twiss asked Foreman Gray to sign a union card shortly before lunch a couple days before Twiss was discharged. Gray "*kind of got excited and said no he didn't want to sign a card. And what made it anything that the union was coming to Tallahassee? There was no work.*"

Harris testified there was another conversation between Gray and Twiss that same day after lunch. Gray said "that Max and Franklin said they knew about a union meeting and that somebody was there and took the names. If there was any more talk about the union on the job, that Franklin would have their check in ten minutes and run their butts off."

Smith testified that he talked with Gray on the evening before Twiss was terminated. Gray told him that things would be better on the third floor if Twiss wasn't walking around talking and interfering with everybody. Gray said that Twiss was talking about the Union. The next morning Smith told Twiss that he had too many complaints on him, that he was interfering with other people working. Smith told Twiss that he didn't care if he talked about the union on his own time but not on company time. Smith told Twiss that he was letting him go.

Smith testified that he made the decision to discharge Twiss. He based that decision on absenteeism, coming in late, being out of his workplace and interfering with other employees. Smith twice verbally warned Twiss about being out of his work area. He did not document those warnings.

Smith testified that within a week of Twiss starting work, Foreman Gray told Smith that Twiss was staying out of his work area and that Twiss was excessively slow on installation. Smith told Twiss that he was going to have to do better than what he was doing and that Twiss didn't have time to walk around and talk to and bother people. Smith told Twiss they were really pushed up there on that floor and he needed every man working and that at $18 an hour he was expecting Twiss to improve his production.

About a week later Smith found Twiss and two helpers not working. Smith told Twiss to go back to work. He told Twiss that he didn't need to be talking and they needed to be working. Smith testified that he told Twiss that he didn't care about him talking about the Union as long as it was before worktime, breaktime, lunch, or afternoon.

Twiss testified that he had never been told of a rule that prohibited talking or that prohibited solicitation. Twiss was never disciplined while he worked for Respondent and he was never spoken to about being out of his work area. On one occasion, on September 12, Smith and Gray talked to Twiss and Harris about work performance. Smith told them that they needed to tighten up. Smith then said, "*Well, don't get me wrong. You're doing a great job. Your work is fine. You just need to do a little bit more of it*."

Respondent also called Higbee. He testified that even though he did not work with Twiss on the TCH project, he continually saw Twiss in areas other than Twiss's regular work area. Higbee testified that he usually saw Twiss out of his work area during the time after the lunchbreak. On those occasions Twiss was standing around talking to people. Higbee testified that he had no knowledge that Twiss had business-related reasons for being out of his regular work area on those occasions. On one occasion Higbee told Twiss that "he needed to get off his ass and get to working." Higbee told Rischar about that incident. According to Higbee, he reported all incidents to Rischar whenever he noticed employees sitting on their butts during working hours.

Lee testified that even though he was not Twiss's foreman, he did observe Lee occasionally out of his regular work area. On occasion Twiss was looking for material or supplies and Lee helped direct Twiss to the proper source but on other occasions Twiss was out of his work area with no work-related purpose. Lee testified that he didn't recall reporting Twiss being out of his work area to anyone because that "was so rampant among many individuals."

Conclusions

Credibility

As shown above, I was not impressed with the demeanor of Smith. Moreover, his testimony did not square with the credited record and in some instances his testimony was inconsistent. For example the General Counsel called Smith early in the hearing. At that time Smith testified that he cautioned Twiss on one occasion about Twiss talking about the Union during work. When asked how he learned that Twiss was talking about the Union, Smith replied that several employees complained to him about Twiss talking about the Union while they were trying to work. Smith testified that none of those employees that complained to him was a foreman.

Respondent subsequently called Smith. At that time, while on cross-examination, Smith testified that Foreman Gray told him that Twiss was talking about the Union. Smith testified that Gray told him that during about the first week that Twiss was on the job. Counsel for the General Counsel asked Smith if any other employees told him that Twiss was talking about the Union and he replied, "I can't recall."

I was more impressed with the testimony of Twiss and Harris than that of Smith, Rischar, and Higbee and I credit Twiss and Harris. I especially credit the testimony of Twiss and do not credit the contrary evidence in regard to Gray's September 13 comments to Twiss regarding what would happen to Twiss if there was talk about the union. Gray did not testify and an affidavit from him contained only a blanket denial.

Finally, there was the question of what was Respondent's rule regarding talking while on the job. Smith implied that Respondent had a rule against talking on the job. However, there was no evidence to show that was the case. Instead, the full credited record showed there was no rule against talking before the September 14 discharge of Twiss. Employees routinely talked while on the job. I credit that testimony of Twiss and do not credit the testimony of Smith.

Findings

The credited record showed that Respondent did not have a rule against solicitation, talking, or distribution before September 14. Nevertheless, the undisputed record shows that Smith discharged Twiss on September 14, and told Twiss that his discharge was because he was recruiting employees for the Union on Smith's time.

Twiss was involved in Union activity. He was a member of the Union and he solicited employees including Foreman Gray to join the Union. Twiss's union activities were proximate in time to his discharge. On the day before he was discharged he asked Foreman Gray to sign a Union card. After refusing to sign the card Gray returned and said to Twiss and told him that Respondent knew which employees had attended a union meeting and that Twiss would be fired and his check delivered in 10 minutes if there was union talk. Twiss overheard Gray say on his cell phone, "*Max, we need to talk immediately*."

In considering whether the evidence supported the General Counsel, I find that the record showed that Twiss was involved in union activities; that Respondent knew he was involved in union activities; that Respondent harbored union animus; that Respondent discharged Twiss on the day following its determination that Twiss was recruiting for the Union; and that Respondent used pretext in trying to justify its discharge of Twiss.[14] I find on the basis of the full credited record that Respondent was motivated to discharge Twiss because of its union animus.[15]

I shall consider whether the record showed that Twiss would have been discharged in the absence of union activities. Respondent in its brief as well as during testimony at the hearing, contended that Twiss was discharged because of absenteeism, being out of his workplace, and interfering with other employees' work. Respondent conceded that "the reason behind Mr. Twiss being out of his workplace and interfering with other employees' work was mostly due to his constant union solicitations."

As to absenteeism, Respondent argued that Twiss missed 2-1/2 days work during the short time he worked for Respondent. Three people testified about Twiss's discharge. Those three witnesses were Twiss, Harris, and Smith. None of those three recalled there being a mention of absenteeism as a reason for Twiss's discharge. I am convinced that absenteeism did not play any part in Respondent's discharge of Twiss.

Respondent also argued that Twiss was discharged because he was frequently out of his work area interfering with other employees' work by talking about the Union.

Superintendent Smith, whose testimony was discredited, did testify that he told Twiss he was discharged. Smith testified that he told Twiss that Twiss was interfering with other people's work, that he did not care if Twiss talked Union on his own time and that Twiss's work performance was not up to what it was supposed to be.

However, as shown above I credited the testimony of Twiss regarding the discharge incident. Twiss testified that Smith gave as the only reason Twiss was discharged, "I'm not going to have you come on my job trying to recruit my men for the union on my time." Harris corroborated Twiss. Harris recalled that Smith told Twiss he was being fired "for promoting the union on my time."

In view of that evidence I do not credit Respondent's argument to the effect that Twiss's union activities had nothing to do with his discharge. The record shows what was on the mind of the decisionmaker at the time he discharged Twiss. Smith discharged Twiss because he felt Twiss was recruiting for the Union and Smith said that to Twiss.

I am aware that employers are sometimes justified in discharging someone for violation of lawful no-solicitation rules. That is not the case here. The record showed that Respondent did not have a no-solicitation rule, or for that matter, any other rule, that lawfully prohibited employees including Twiss, from soliciting for the Union.

Finally, I shall consider whether the credited record shows that Twiss would have been discharged because he interfered with other employees' work in the absence of union activity. In that regard Respondent argued that it did not matter what Twiss was saying in his discussions with other employees. Instead, only the fact that Twiss was interfering with others' work contributed to his discharge.

[14] Respondent alleged that it discharged Twiss because he was recruiting for the Union on Company time when Respondent had no rule prohibiting talking, soliciting, or distributing during work time. Moreover, as shown above, Respondent contended during the hearing that additional factors including absenteeism, being out of his work area and interfering with other employees contributed to Twiss's discharge even though Superintendent Smith stated only one reason for Twiss's discharge when he discharged him.

[15] Among other evidence the record proved animus through statements Smith made when he discharged Twiss as well as by the other unfair labor practices found herein.

Respondent was left with only discredited testimony to support its argument. Respondent's witnesses including Smith and Higbee testified to numerous warnings to Twiss for interfering with others' work. As shown above I did not credit that testimony. Instead I credited the testimony of Twiss. Twiss testified that no supervisor or foreman ever told him that he was talking too much, or that he was leaving his work area too frequently.

Moreover, the record showed that it was not unusual for employees to be out of their work areas while on the TCH job. Foreman Lee testified that he didn't recall reporting Twiss being out of his work area to anyone because that "was so rampant among many individuals." There was no showing that Respondent discharged any of those "many individuals" mentioned by Lee, other than Twiss.

Twiss testified that on one occasion Smith along with Foreman Gray talked to Twiss and employee Harris. Smith told them that they needed to tighten up and that Smith did not think they had done enough on one particular project. However, Smith went on to say,

> *Well, don't get me wrong. You're doing a great job. Your work looks fine. You just need to do a little bit more of it.*

As shown above, there was no documented evidence and there was no credited testimony that Twiss was ever disciplined before his September 14 discharge. Therefore, I find that Respondent's contention that Twiss was discharged because he interfered with other employees' work without regard to whether he was talking about the Union, was not supported by credited evidence. I find that the evidence failed to show that Twiss would have been discharged in the absence of his union activity or in the absence of animus.

Discharge of Robert Fernandez

Fernandez's last day with Respondent was October 4, 2002. Fernandez wore a union T-shirt to work that day for the second consecutive day. As Fernandez was gathering his tools at the end of the work day, Superintendent Smith came to him and said, "*Bob, I need to talk to you a minute. We're going to have to let you go.*" Fernandez asked if he was being laid off or fired and Smith responded, "*No. But, we're just going to have to let you go. You've done a fine job for us and all that but we're kind of catching up and it's time to let you go.*" Smith gave Fernandez two envelopes containing payroll checks. Smith said, "*We didn't think that you would take a reduction in pay so we're letting you go.*" Fernandez replied that he was willing to take a reduction. Smith stated, "We don't need you any more."

Fernandez testified that he asked Smith if he was being let go because of his union T-shirt or what. Smith looked at him but did not say anything regarding Fernandez's T-shirt.[16]

Smith had talked to Fernandez earlier about a pay reduction. In September Smith told Fernandez that Respondent wanted to keep people but "*we're going to have to reduce their pay, of course.*"[17] Fernandez stated to Smith, "*I don't know. I don't think I can do that, you know*." However, the next morning Fernandez told Foreman Lee that he had changed his mind and that he would stay at reduced wages. He asked Lee to make sure Smith knew about his changed decision. Later that day Fernandez also told Job Superintendent Rischar that he had changed his mind and would take a pay cut to stay on.[18]

Fernandez has been a member of Local 435 for the last 1-1/2 years. He started working for Respondent as a sheet metal mechanic on the TCH project in July 2002. His foreman was Lee. Fernandez solicited other employees to sign union authorization cards while at work beginning in September 2002. He asked two employees to sign cards.

Fernandez testified that he attended union meetings on a couple of occasions while he worked for Respondent. The first meeting he attended was in September and there were about 25 to 30 people present. About half of those were TCH employees of Respondent. The second meeting attended by Fernandez was held about 2 weeks after the first. There were about six or seven employees present and all of them worked for Respondent at the TCH project.

When Fernandez had on a union T-shirt on the day before his discharge Fernandez asked Lee what was wrong; you "*don't like the T-shirt?*" Lee replied, "*I really don't give a damn about the T-shirt.*" Lee admitted that he noticed Fernandez wore a union T-shirt. He testified that Hernandez pointed the shirt out to him on the day before Hernandez's last day with Respondent. Hernandez told Lee that he believed he would be fired because he was wearing a union shirt. Lee testified that he responded to Hernandez, "*Oh, they don't care about that.*"

Smith testified that he had no problems with Fernandez's work. It was just that Fernandez did not turn out enough work for the amount of money he was making. Lee testified that even though Fernandez was initially an excellent worker, his production dropped off. Job Superintendent Rischar testified that Fernandez appeared to really bust his butt for the first couple of weeks. Then he seemed to slow down and Rischar oftentimes saw Fernandez and his helper out of their work area. Rischar never had any problems with the quality of Fernandez's work and he never said anything to Fernandez about his production or about his being out of his work area.

Conclusions

Credibility

After consideration of the full record and the demeanor of the witnesses I credit the testimony of Fernandez. I do not credit the testimony of Smith, Lee, and Rischar to the extent their testimony conflicted with credited testimony including that of Fernandez. I find especially unbelievable Smith's testimony that he did not notice that Fernandez was wearing a union T-shirt on the day he was terminated. I find that surprising especially in view of Foreman Lee's admission that he noticed Fernandez wearing a union T-shirt.

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[16] Smith testified that he did not notice what Fernandez was wearing.

[17] The record showed that Respondent was forced to hire new sheet metal mechanics on the TCH project and that it was forced to pay them more than it had been paying sheet metal mechanics. Fernandez did not dispute that Smith spoke to him early during his time with Respondent, about staying on after the TCH job but at reduced pay.

[18] Both Rischar and Lee testified but neither disputed Fernandez's testimony that he told them he had changed his mind and would stay on for reduced pay.

Findings

I shall consider whether the evidence shows that Respondent terminated Fernandez because of its Union animus, and, if so, I shall consider whether Fernandez would have been terminated in the absence of union activity.

As shown herein, Respondent harbored union animus. As to Fernandez the evidence illustrated that Fernandez has been a union member for a year and a half and he engaged in union activity on the TCH job by soliciting other employees to sign union authorization cards. He attended union meetings and he wore Union clothing to work. The evidence proved that Respondent was aware of Fernandez's union activities. Fernandez testified without rebuttal that he wore a union T-shirt on the last 2 days he worked for Respondent. Lee testified that he noticed Fernandez wearing a union T-shirt on the day before his termination.

Finally, the timing of Fernandez's discharge contributed to my findings. Fernandez wore a union T-shirt on the day of and the day before his termination. Moreover, as shown above, Smith, was untruthful in his testimony regarding Fernandez wearing a union shirt on the day of his termination.

In view of that evidence, the full record and the evidence of Respondent's animus against the Union, I find that Respondent terminated Fernandez because of its union animus. With that in mind, I shall consider whether Fernandez would have been terminated in the absence of union activity.

Respondent contended that Fernandez was not terminated. Instead it argued that Fernandez turned down its offer to continue working for Respondent at reduced wages.

However, that defense was not supported by credited evidence.

The record was not in dispute but that Smith talked to Fernandez about Fernandez continuing to work for Respondent. Smith told Fernandez that Respondent wanted to keep people after the TCH job but Respondent would have to reduce their wages.[19]

Even though at one time Fernandez told Smith that he did not believe he could accept reduced wages, Fernandez changed his mind and told his foreman, Lee, that he would continue working for Respondent for $14. Fernandez also told Job Superintendent Rischar that he would continue working for Respondent even though it would entail a pay cut.

Finally, as shown by the credited testimony of Fernandez, after telling Fernandez of his termination on October 4, Smith told Fernandez, "We didn't think that you would take a reduction in pay so we're letting you go." Fernandez replied that he was willing to take a reduction in pay but Smith replied to the effect that Fernandez was no longer needed.

I find that after initially telling Smith he could not accept a pay cut, Fernandez changed his mind and told both Foreman Lee and Job Superintendent Rischar that he would take a pay cut. Thereafter, Fernandez told Smith that he was willing to take a pay cut at the time Smith said he was being released. That evidence shows that all Fernandez's supervisors knew that Fernandez was willing to continue working at reduced pay.

In view of the full record I find that Fernandez did not refuse to work for less pay. I find that Fernandez did not quit. Instead Smith discharged Fernandez on October 4.

Respondent also argued that Fernandez was too slow to justify continuing paying him $18 an hour. However, the full record showed that Fernandez's production had nothing to do with his termination. Instead Respondent contended that it was willing to continue working Fernandez at a lower wage.

Additionally, I find that Respondent never considered discharging Fernandez because of his production. At the time of his termination Smith said nothing to show unhappiness with either Fernandez's work or with his production and there was no evidence that Smith ever considered Fernandez's production as a reason for discharge.

I find that the record failed to show that Respondent would have discharged Fernandez in the absence of his union activities.

Legal Conclusions Regarding Twiss and Fernandez

In view of my findings and the full record, I find the General Counsel proved that Respondent was motivated by Union animus to discharge Twiss and Fernandez and I find that Respondent would not have discharged Twiss or Fernandez in the absence of their union activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

CONCLUSIONS OF LAW

1. By interrogating its employees about union activities; by creating the impression that it was engaged in surveillance of its employees' union activities; by threatening its employees with discharge because of their union activities; by discriminatorily prohibiting its employees from discussing the Union while on its job; by soliciting its employees to revoke their union authorization cards and by threatening its employees with loss of job opportunities because of their union activities, Kelly Brothers Sheet Metal, Inc. has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By discharging and refusing to reinstate its employees Twiss and Fernandez, Respondent, Kelly Brothers Sheet Metal, Inc., violated Section 8(a)(1) and (3) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees Twiss and Fernandez, it must offer Twiss and Fernandez immediate reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent jobs, and make Twiss and Fernandez whole for all lost earnings and other benefits, computed on a quarterly basis from date of discharge to date of

[19] As shown herein, Respondent offered reduced wages to employees after the TCH project without regard to the employee's past performance. Respondent had paid lower wages until it was forced to hire additional mechanics on the TCH project at higher wage rates. Respondent talked to some TCH mechanics about staying after that project but at lower wage rates.

proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Respondent, Kelly Brothers Sheet Metal, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees about union activities.

(b) Creating the impression that it is engaged in surveillance of its employees' union activities.

(c) Threatening its employees with discharge because of their union activities.

(d) Discriminatorily prohibiting its employees from discussing the Union while on its job.

(e) Soliciting its employees to revoke their union authorization cards.

(f) Threatening its employees with loss of job opportunities because of their union activities.

(g) Discharging and refusing to reinstate its employees because of their union activities.

(h) In any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed you by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order offer immediate reinstatement to Twiss and Fernandez to their former jobs, or, if those jobs no longer exist, to substantially equivalent jobs and make Twiss and Fernandez whole for all lost pay and other benefits suffered since their discharges.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Twiss and Fernandez and within 3 days thereafter notify Twiss and Fernandez in writing that this has been done and that their discharges will not be used against them in any way.

(c) Within 14 days after service by the Region, post at its facility or office in Tallahassee, Florida, copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 2002.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 3, 2003

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unlawfully interrogate our employees because of their protected and union activities.

WE WILL NOT create the impression that we are engaged in surveillance of our employees' activities on behalf of Sheet Metal Workers' International Association Local Union No. 435, AFL–CIO, or any other labor organization.

WE WILL NOT threaten to discharge our employees because of their union activities.

WE WILL NOT discriminatorily prohibit our employees from discussing the Union while on their jobs.

WE WILL NOT solicit our employees to revoke their union authorization cards.

WE WILL NOT threaten our employees with loss of job opportunities because of their union activities.

WE WILL NOT discharge or fail to properly reinstate any of our employees because of their union activities.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer George Twiss and Robert Fernandez immediate reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent jobs.

WE WILL make George Twiss and Robert Fernandez whole for all lost wages and other benefits incurred by them since their discharges.

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of George Twiss and Robert Fernandez and WE WILL, within 3 days thereafter, notify Twiss and Fernandez in writing that this has been done and that his discharge will not be used against him in any way.

KELLY BROTHERS SHEET METAL, INC.